

# Reclamation Manual

## Directives and Standards

**TEMPORARY RELEASE**  
(Expires 07/11/2011)

### APPENDIX A

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#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: November 7, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

■ 40 CFR part 52 is amended as follows:

#### PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

#### Subpart NN—Pennsylvania

■ 2. In § 52.2020, the table in paragraph (e)(1) is amended by adding an entry for the 2002 Base Year Emissions Inventory for the Pittsburgh-Beaver Valley

Nonattainment Area at the end of the table to read as follows:

#### § 52.2020 Identification of plan.

(e) \* \* \*  
(1) \* \* \*

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
2002 Base Year Emissions Inventory.	Pittsburgh-Beaver Valley Nonattainment Area: Allegheny, Armstrong, Beaver, Butler, Fayette, Washington, and Westmoreland counties.	4/26/07	11/17/08 [Insert page number where the document begins].	

[FR Doc. E8-27210 Filed 11-14-08; 8:45 am]  
BILLING CODE 6560-50-P

#### DEPARTMENT OF THE INTERIOR

#### Bureau of Reclamation

#### 43 CFR Part 404

#### RIN 1006-AA54

#### Reclamation Rural Water Supply Program

AGENCY: Bureau of Reclamation, Interior.

ACTION: Interim final rule.

**SUMMARY:** Reclamation is issuing this interim final rule to establish programmatic criteria for the Reclamation Rural Water Supply Program (Rural Water Supply Program), including criteria governing prioritization, eligibility, and the evaluation of appraisal investigations and feasibility studies. Title I of the Reclamation Rural Water Supply Act of 2006, Public Law 109-451 (Act), authorized Reclamation to establish the Rural Water Supply Program and requires publication of programmatic criteria in the *Federal Register*. This rule is intended to define for potential participants how the Rural Water Supply Program authorized by the Act will be administered.

**DATES:** This rule is effective December 17, 2008. Submit comments on the rule by January 16, 2009. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of December 17, 2008. This interim final

rule serves as a 60-day *Federal Register* notice to the public allowing them to comment on our information collection. Comments on the information collection must be received by January 16, 2009.

**ADDRESSES:** You may submit comments on this rule, identified by the number 1006-AA54, by one of the following methods:

—*Use of the Federal rulemaking Web site:* <http://www.regulations.gov>. Follow the instructions for submitting comments. This rule has been assigned Docket Identification number BOR-2008-0002.  
—*By mail to:* Bureau of Reclamation, Denver Federal Center, P.O. Box 25007, Building 67, Denver, CO 80225, Attention: Avra Morgan, Mail Code 84-52000. Please include the number 1006-AA54 in your correspondence.

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under an emergency submission. The assigned OMB control number is 1006-0029. Please submit comments on the information collection to the Bureau of Reclamation, Attention: Avra Morgan, P.O. Box 25007, Denver, CO 80225 or by e-mail to [RuralWaterProgram@do.usbr.gov](mailto:RuralWaterProgram@do.usbr.gov).

**FOR FURTHER INFORMATION CONTACT:** Avra Morgan at 303-445-2906 or James Hess at 202-513-0543.

#### SUPPLEMENTARY INFORMATION:

#### I. Background

#### The Rural Water Supply Program

Title I of the Act authorizes the Secretary of the Interior (Secretary) to create the Rural Water Supply Program to address rural water needs in the

Reclamation States. Authority and responsibility for implementing the provisions of the Act are delegated to Reclamation. Reclamation's rulemaking will establish comprehensive criteria and program requirements governing the implementation of the Rural Water Supply Program.

Reclamation has significant experience in the development of rural water projects. Since 1980, Congress has directed Reclamation to undertake 10 specific rural water projects, and Reclamation has a century of experience developing and managing water delivery systems in the West. However, prior to the passage of the Act in 2006, Reclamation did not have a formal rural water program. The program to be implemented by this rule will allow Reclamation to be involved in planning and prioritizing rural water projects to ensure that the projects selected are cost-effective and that they are in the Federal interest.

The Act specifically authorizes the Secretary to undertake the following activities in implementing the Rural Water Supply Program: (a) Investigate opportunities to ensure safe and adequate rural water supply projects for domestic, municipal, and industrial use in small communities and rural areas of the Reclamation States; (b) plan the design and construction of rural water supply projects through the conduct of appraisal investigations and feasibility studies; and (c) oversee, as appropriate, the construction of rural water supply projects that are recommended for construction by Reclamation in a feasibility report developed under the Rural Water Supply Program, and subsequently authorized by Congress.

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Reclamation's Rural Water Supply Program is focused on planning rural water supply projects that incorporate a regional or watershed approach to water management. This means focusing on projects that will provide water to geographically dispersed localities distributed across a region or a watershed, in order to take advantage of economies of scale and to foster opportunities for partnerships. In carrying out this program, Reclamation will take into account the interconnectedness of water and land resources, encourage the active participation of all interested groups, and use the full spectrum of technical disciplines in activities and decision-making.

Reclamation has demonstrated expertise and experience in planning and constructing larger water supply projects that address the needs of more than one community. Reclamation's focus on regional water systems will complement, rather than duplicate, the existing Federal programs that support the delivery of potable water for rural areas in the United States. This will not only meet a clearly identified need in the western United States, but will also leverage Federal, state, and local funding to maximize the support provided to rural areas and ensure the most effective use of Federal dollars.

### Overview of the Rule

This rule has the following five subparts: (1) Subpart A provides an overview of the Rural Water Supply program; (2) Subpart B covers cost-sharing requirements; (3) Subpart C describes how an appraisal investigation will be evaluated under the program; (4) Subpart D describes how a feasibility study will be evaluated under the program; and (5) Subpart E describes miscellaneous requirements.

Subpart A of the rule contains eligibility criteria, criteria for prioritizing requests for assistance under the program, definitions, and the process for requesting assistance under the program. Section 404.6 of the rule describes who is eligible to participate in the program, and § 404.7 describes the types of projects that are eligible for consideration. These eligibility requirements closely track the requirements in Title I of the Act.

Section 404.11 of the rule describes the types of assistance available under the program, including: (1) Technical assistance from Reclamation to conduct an appraisal investigation or feasibility study; (2) financial assistance to enable a non-Federal entity to conduct an appraisal or feasibility study themselves with Reclamation oversight; and (3)

Reclamation review and approval of a completed appraisal or feasibility study.

Subpart A of the rule describes in detail the process by which Reclamation will announce opportunities for assistance under the program (§ 404.14), how to request assistance (§ 404.15), and how such requests will be prioritized and reviewed by Reclamation (§§ 404.17, 404.22 and 404.27). Section 404.13 of the rule contains the criteria that Reclamation will use to prioritize all requests for assistance under the program. This section further emphasizes the focus of Reclamation's Rural Water Supply Program on projects that will apply a regional or watershed perspective to water resources management.

Subpart B of the rule describes all cost-sharing requirements related to the Rural Supply Water Program. This includes the non-Federal cost-share requirements for completing appraisal investigations and feasibility studies (§§ 404.30 and 404.33, respectively), and the non-Federal cost-share requirements for the construction of rural water projects once construction authorization is provided by Congress (§ 404.37). An important part of Reclamation's role in evaluating a feasibility study under the program is to consider the non-Federal entity's capability to pay at least 25 percent of the cost of constructing a rural water project (§ 404.39).

Subparts C and D of the rule describe the criteria that Reclamation will use to evaluate appraisal investigations and feasibility studies completed under the program (§§ 404.44 and 404.49, respectively). These criteria closely track the provisions in Title I of the Act. The requirements in Subparts C and D of the rule will enable Reclamation to ensure that all appraisal and feasibility studies completed under the program meet Reclamation's standards, whether the studies are completed by Reclamation or by the non-Federal entity.

Subpart E of the rule contains several miscellaneous requirements. Among these is the requirement that title to projects constructed subsequent to participation in the Rural Water Supply Program shall be held by the non-Federal entity (§ 404.54). Another important requirement in Subpart E, among others, is the provision that rural water projects authorized before passage of the Act (§ 404.58) do not have to comply with the requirements in this rule.

### Waiver of Notice of Proposed Rulemaking

Ordinarily, a notice of proposed rulemaking is published in the **Federal Register** and the public is invited to comment on the proposed rule in accordance with the Administrative Procedure Act (APA), as codified in 5 U.S.C. 553(b). The notice of proposed rulemaking includes a reference to the legal authority under which the rule is proposed, and the terms and substances of the proposed rule or a description of the subjects and issues involved. This procedure can be waived, however, if an agency finds good cause that a notice and comment procedure is impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued.

This rule is required as a result of the enactment of Title I of the Act, which provides that the Secretary will develop three sets of criteria for the Rural Water Supply Program within specified timeframes. Section 103 of the Act requires the promulgation of programmatic eligibility and prioritization criteria within 1 year of the date of enactment; § 105 requires criteria for the evaluation of appraisal investigations to be developed within 1 year of the date of enactment; and § 106 requires the promulgation of criteria for the evaluation of feasibility studies within 18 months of the date of enactment.

Current data indicate that millions of Americans still live without safe drinking water, a basic necessity of life. The Bureau of Reclamation has significant experience and technical capabilities in the planning, design and construction of rural water supply projects. Until now, however, Reclamation has never had a structured program for developing or funding rural water projects. Delaying the enactment of this rule in order to provide notice and comment would delay the implementation of a program to address water supply needs of rural communities. Furthermore, this rule closely tracks the detailed requirements of the Act.

### Procedural Requirements

1. Regulatory Planning and Review (Executive Order (E.O.) 12866)

This document is a significant rule and OMB has reviewed this rule under Executive Order 12866. We have made the assessments required by E.O. 12866 and the results are given below.

(a) This rule will not have an annual effect of \$100 million or more on the economy. It will not adversely affect in

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any material way the economy, productivity, competition, jobs, environment, public health or safety, or state, local, and tribal governments or communities. On the contrary, the Rural Water Supply Program addressed by this rule will facilitate the planning of rural water systems that are urgently needed in order to maintain the economies and the public health and safety of the communities that they will serve. Moreover, the criteria established in this rule will ensure that the rural water projects planned under this program address a documented need, are economically feasible, and are affordable to the intended beneficiaries. The evaluation of rural water projects planned under this program will also take into account changes in regional economic activity associated with each project, as measured by regional income and employment.

As explained in the rule, Reclamation will only recommend a rural water project to Congress for construction if the project is determined to be economically feasible, among other requirements. Economic feasibility means that the estimated national economic benefits of a project exceed the costs. Analysis of rural water projects that have been authorized in the past indicates that they have not met the economic feasibility criteria. Therefore, the planning process set forth in the rule will result in rural water projects with potentially greater economic benefits. Implementation of this program will allow for the development of projects with a greater economic return to the Nation.

The Act requires an analysis documenting the ability of the project sponsor to pay 100 percent of operation, maintenance, and replacement costs as well as a portion of construction costs (minimum of 25 percent). This provision will reduce the risk of financial failure of a project due to the inability of water users to pay their portion of project costs in the future.

The Act authorizes appropriations of \$15 million annually. Therefore, we expect our expenditures on the program over the next 4 fiscal years, including administrative costs, to be \$15 million or less, annually. Authority to make appropriations under the program expires on September 30, 2016. Subsequent to that expiration, limited administrative costs would continue as previously authorized appraisal and feasibility studies are completed.

(b) This rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The rule requires all potential applicants to

demonstrate that they have investigated other opportunities for funding and places a higher priority on funding projects that are not eligible for full assistance under any other rural water program. Rural water supply projects that incorporate a regional or watershed approach to water management planning are also prioritized higher under the program. In contrast, other rural water programs are focused on smaller rural water systems and do not provide assistance for these larger, more complex, types of rural water projects. This rule further requires Reclamation to consult and cooperate with other Federal agencies, tribes, states, and local governments whenever an appraisal investigation or feasibility study is conducted under the program. Reclamation has consulted with the United States Department of Agriculture (USDA) regarding the details of USDA's related programs, and will continue to do so.

(c) This rule does not alter the budgetary effects of entitlements, grants, user fees, concessions, loan programs, water contracts, management agreements, or the rights and obligations of their recipients; all of these will continue unaffected by the approval of any assistance under these rules.

(d) OMB has determined that this rule raises novel legal or policy issues. The rule, which implements the Act, establishes criteria for a new rural water program to be administered by Reclamation. While Reclamation has been involved in the construction of rural water projects for over 20 years, it has never had a formal rural water program. The program will allow Reclamation to be involved early on in the planning stages of creating a rural water project, and to prioritize the projects that it recommends for construction.

#### 2. Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). This rule does not impose any new requirements for small businesses to report or keep records on any of the requirements contained in this rule. Entities seeking financial assistance under the rule will be subject to those reporting and recordkeeping requirements (government-wide uniform administrative requirements) that normally apply to financial assistance agreements pursuant to 43 CFR 12. The entities eligible for assistance under this program may include small entities defined in the

Regulatory Flexibility Act. However, application for assistance is strictly voluntary, and these entities may continue to rely on their own financing capabilities as they currently do. One of the purposes of this rule is to provide these entities with the requirements they must follow if they choose to apply for assistance from Reclamation. An Initial Regulatory Flexibility Analysis is not required and, accordingly, a Small Entity Compliance Guide is not required.

#### 3. Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule:

(a) Does not have an annual effect on the economy of \$100 million or more. The Act authorizes appropriations of \$15 million annually. Therefore, we expect our expenditures on the program over the next 4 fiscal years, including administrative costs, to be \$15 million or less, annually. Authority to make appropriations under the program expires on September 30, 2016. Subsequent to that expiration, limited administrative costs would continue as previously authorized appraisal and feasibility studies are completed.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, state, local, or tribal government agencies, or geographic regions. Entities planning to construct a rural water supply project, including state, local or tribal government entities, would most likely conduct appraisal investigations and feasibility studies regardless of whether they participate in the program implemented under this rule. Because the rule provides that Reclamation will pay 100 percent of the cost of an appraisal investigation up to \$200,000, and 50 percent of the cost of a feasibility study, the rule actually decreases the cost to state, tribal and local governments that want to plan a rural water supply project.

The Federal cost-share requirement for studies conducted under the Rural Water Supply Program will increase the cost to Reclamation because Reclamation has not previously been involved in preparing these types of planning studies for rural water supply projects. However, pursuant to the limitation on appropriations under the Act, Reclamation's cost may not exceed \$15 million per year.

(c) This rule is not likely to have any effect on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-

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based enterprises. As mentioned in (b), the effect of the Federal cost-share requirement included under the rule will likely be to reduce the cost of appraisal investigations and feasibility studies to entities participating in the program. The rule encourages competition by allowing interested entities to either request financial assistance (a grant or cooperative agreement) to perform an appraisal investigation or feasibility study themselves, or request Reclamation to perform the investigation or study for them. The rule requires an entity requesting financial assistance to demonstrate the cost-effectiveness of its proposal, compared to the cost of Reclamation performing the investigation or study.

#### 4. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate or a requirement to expend monies on the part of state, local, or tribal governments or communities, or the private sector of \$100 million or more annually. This rule does not have a significant or unique effect on state, local, or tribal governments or communities, or the private sector. Requests from any of these entities for assistance under this rule are strictly voluntary. Reclamation is not imposing a duty, requirement, or mandate on state, local, or tribal governments or communities, or the private sector to request such assistance. Therefore, a statement containing information required by the Unfunded Mandates Reform Act (2 U.S.C. 1541, *et seq.*) is not required.

#### 5. Takings (E.O. 12630)

Under the criteria in E.O. 12630, this rule does not have any significant takings implications. This rule sets forth the requirements for requesting assistance from Reclamation for planning eligible rural water supply projects that are urgently needed by the project beneficiaries. While there are cost-share requirements for receiving assistance under the program, participation in the program is strictly voluntary, and the beneficiaries may choose instead to conduct an appraisal investigation or feasibility study on their own, financing the complete cost themselves. A Takings Implication Assessment is therefore not required.

#### 6. Federalism (E.O. 13132)

Under the criteria in E.O. 13132, this rule does not have any federalism implications to warrant the preparation of a Federalism Assessment. The rule is not associated with, nor will it have substantial direct effects on the states,

on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. A Federalism Assessment is therefore not required.

#### 7. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

- (a) Does not unduly burden the judicial system;
- (b) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (c) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

#### 8. Consultation With Indian Tribes (E.O. 13175)

Under the criteria of E.O. 13175, Reclamation has evaluated this rule and determined that it would have no substantial effects on federally recognized Indian tribes. While many tribal entities may be eligible for assistance with planning a rural water supply project under this rule, such application is strictly voluntary.

#### 9. Paperwork Reduction Act

This rule contains information collection requirements, and a submission under the Paperwork Reduction Act (PRA) is required. Participation in the application process and the submission of information through that process is voluntary. This rule will not require the use of any forms other than those forms required for Reclamation to provide financial assistance under the program, including SF-424A and SF-424B, titles already approved by OMB. Following are further details regarding the information collection:

*Title:* Reclamation Rural Water Supply Program 43 CFR Part 404.  
*OMB Control No.:* 1006-0029.

*Frequency:* One-time voluntary application.

*Respondents for Program Assistance Applications:* Eligible entities (described in § 404.6 of the rule) that desire to obtain assistance from Reclamation under the program.

*Estimated Total Number of Respondents:* 56.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 2,100 hours.

OMB has approved the information collection requirements contained in

this rule under an emergency submission. The assigned OMB Control Number is 1006-0029, which expires on May 31, 2009. Under OMB Guidelines at 5 CFR 1320.13, we requested emergency processing of the information collection request. The Rural Water Supply Program will address rural water needs in the western United States by assisting rural communities to plan the design and construction of rural water projects. Eligible entities interested in participating in the program will be requested to submit information to allow Reclamation to evaluate and prioritize requests for financial or technical assistance. According to the emergency processing procedures, we have determined that:

(1) This information collection will be published in the **Federal Register** concurrent with the rulemaking.

(2) Delaying the enactment of this rule would delay the implementation of a program to address water supply needs of rural communities. Additionally, the information collected is general information about the water supply needs of the applicants and therefore, will be readily available to the applicants.

We have not formally consulted with potential respondents on the impact of this burden due to time constraints. Our estimate of the annual burden hours is based on Reclamation's experience with similar application processes for other programs. As part of our continuing effort to reduce paperwork and respondent burdens, Reclamation invites the public and other Federal agencies to comment on any aspect of the reporting and recordkeeping burden. In particular, comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information will have practical use;

(b) The accuracy of our burden estimate for the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, usefulness, and clarity of the information collected; and

(d) Ways to minimize the burden of the collection of information on respondents.

Please refer to the **DATES** and **ADDRESSES** sections for deadlines and instructions on submitting comments. You may obtain a copy of the supporting statement for this new collection of information by contacting the Bureau of Reclamation at 303-445-2906.

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### 10. National Environmental Policy Act of 1969 (NEPA)

This rule does not constitute a major Federal action and would not have a significant effect on the quality of the human environment. While the individual feasibility studies for which assistance may be sought under this interim final rule require NEPA compliance, the requirement for such compliance would not be dependent on whether financial assistance is granted under this rule. Therefore, this rule does not require the preparation of an environmental assessment or environmental impact statement under the requirements of NEPA.

### 11. Information Quality Act

In developing this rule, there was no need to conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106-554).

### 12. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

### 13. Clarity of This Regulation

We are required by E.O. 12866 and 12988, and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you believe we have not met these requirements, please send comments to Reclamation as instructed in the **ADDRESSES** section. Please make your comments as specific as possible, referring to specific sections and how they could be improved. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

### 14. Public Availability of Comments

Before including your name, address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment

to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

### List of Subjects in 43 CFR Part 404

Drinking water, Federal aid programs, Incorporation by reference, Natural resources, Public utilities, Rural areas, Water supply, and Watersheds.

Dated: November 3, 2008.

**Kameran L. Onley,**

*Acting Assistant Secretary for Water and Science.*

■ For the reasons stated in the preamble, the Bureau of Reclamation proposes to add a new part 404 to Title 43 of the Code of Federal Regulations as follows:

## **PART 404—RECLAMATION RURAL WATER SUPPLY PROGRAM**

### **Subpart A—Overview**

Sec.

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- 404.7 What types of projects are eligible for consideration under the program?
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- 404.9 What types of infrastructure and facilities may be included in an eligible rural water supply project?
- 404.10 Are there certain types of infrastructure and facilities that may not be included in a rural water supply project?
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- 404.16 What information must I include in my statement of interest?
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- 404.19 What requirements must be met before I can request assistance to conduct a feasibility study?
- 404.20 What information must I include in my full proposal to conduct an appraisal or a feasibility study?
- 404.21 What is Reclamation's role in preparing the full proposal?

404.22 How will Reclamation evaluate my full proposal?

404.23 How will Reclamation determine whether you or your contractor is qualified to conduct an appraisal investigation or a feasibility study?

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404.28 Is it possible to expedite the completion of an appraisal investigation or feasibility study?

404.29 Can the level of effort needed to complete an appraisal investigation or feasibility study be scaled to be proportional to the size and cost of the proposed project?

### **Subpart B—Cost-Sharing**

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404.31 What forms of non-Federal cost-share payment are acceptable?

404.32 Can Reclamation reduce the non-Federal cost-share required for an appraisal investigation?

404.33 How much Federal funding can Reclamation provide for the completion of a feasibility study?

404.34 Can Reclamation reduce the amount of non-Federal cost-share required for a feasibility study?

404.35 Is there a different non-Federal cost-share requirement for feasibility studies that involve a community greater than 50,000 inhabitants?

404.36 Will Reclamation reimburse me for the cost of an appraisal investigation or a feasibility study that was not completed under § 404.11(a) or (b)?

404.37 How will Reclamation determine the appropriate non-Federal share of construction costs?

404.38 Are there different requirements for determining the appropriate non-Federal share of construction costs to be paid by Indian tribes?

404.39 What factors will Reclamation consider in evaluating my capability to pay 25 percent or more of the construction costs?

404.40 What is the non-Federal share of operation, maintenance, and replacement costs?

### **Subpart C—Appraisal Investigations**

404.41 How will an appraisal investigation be conducted under this program?

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- 404.43 What process will Reclamation follow to determine if an appraisal investigation is ready for review?
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- 404.45 What will be included in the appraisal report prepared by Reclamation?
- 404.46 Who will the appraisal report be provided to?

### Subpart D—Feasibility Studies

- 404.47 How will a feasibility study be conducted under this program?
- 404.48 What process will Reclamation follow to determine if a feasibility study is ready for review?
- 404.49 What criteria will Reclamation use to determine whether to recommend that a proposed rural water supply project be authorized for construction?
- 404.50 What information will be included in the feasibility report prepared by Reclamation?
- 404.51 Are proposed projects under the Rural Water Supply Program reviewed by the Administration?
- 404.52 Who will the feasibility report be provided to?

### Subpart E—Miscellaneous

- 404.53 Does this rule provide authority for the transfer of pre-existing facilities from Federal to private ownership, or from private to Federal ownership?
- 404.54 Who will hold title to a rural water project that is constructed following the completion of an appraisal investigation or feasibility study under this program?
- 404.55 Who is responsible for the operation, maintenance, and replacement costs?
- 404.56 If a financial assistance agreement is entered into for a rural water supply project that benefits more than one Indian tribe, is the approval of each Indian tribe required?
- 404.57 Does this rule have any effect on state water law?
- 404.58 Do rural water projects authorized before the enactment of the Rural Water Supply Act of 2006 have to comply with the requirements in this rule?
- 404.59 If the Secretary recommends a project for construction, is that a promise of Federal funding?
- 404.60 Does this rule contain an information collection that requires approval by the Office of Management and Budget (OMB)?

Authority: Public Law 109–451 (43 U.S.C. 2401 *et seq.*)

### Subpart A—Overview

#### § 404.1 What is the purpose of this part?

The purpose of this part is to explain how the Reclamation Rural Water Supply Program is implemented. This part describes:

- (a) The purpose and priorities of the program;
- (b) How to apply for assistance under the program;

(c) How Reclamation will evaluate requests for assistance;

(d) How Reclamation will evaluate an appraisal investigation; and

(e) How Reclamation will evaluate a feasibility study.

#### § 404.2 What terms are used in this part?

The following terms are used in this part:

*Appraisal Investigation* means an analysis of domestic, municipal, and industrial water supply problems, needs, and opportunities in the planning area, primarily using existing data. An appraisal investigation includes a preliminary assessment of alternatives to address the identified water supply problems and needs. The purpose of an appraisal investigation is to determine if there is at least one viable alternative that warrants a more detailed investigation through a feasibility study.

*Appraisal Report* means the document, prepared by Reclamation, setting forth the findings and conclusions reached by Reclamation in its evaluation of a completed appraisal investigation. The purpose of the appraisal report is for Reclamation to provide a recommendation on whether a feasibility study should be initiated.

*Assistance* means the transfer of a thing of value to a non-Federal project sponsor to carry out a public purpose of support or stimulation authorized by law. For purposes of this rule, assistance consists of funds provided by Reclamation through an assistance agreement (grant or cooperative agreement) and technical assistance performed by Reclamation, for the purpose of conducting an appraisal investigation or a feasibility study.

*Commissioner* means the Commissioner of the Bureau of Reclamation.

*Feasibility Report* means the document, prepared by Reclamation, setting forth the findings and conclusions of a completed feasibility study. The purpose of the feasibility report is to provide an Administration recommendation to Congress regarding whether the proposed rural water supply project should be authorized for construction.

*Feasibility Study* means a detailed investigation requiring the acquisition of primary data, and an analysis of a reasonable range of alternatives, including a preferred alternative, to meet identified water supply problems, needs, and opportunities in the planning area. A feasibility study also includes an analysis of the technical and economic feasibility of the proposed project, the impact of the

proposed project on the environment in compliance with the National Environmental Policy Act and other applicable environmental laws, and the financial capability of the non-Federal project sponsor to pay the non-Federal costs associated with constructing, operating, and maintaining the rural water supply project. The completed feasibility study will form the basis for the recommendation to Congress in the feasibility report regarding whether the proposed rural water supply project should be authorized for construction.

*Incidental Noncommercial Livestock Watering* means the supply of water to pasture taps for the purpose of watering livestock, and other livestock watering uses that are incidental to the purpose of the project.

*Indian* means a person who is a member of an Indian tribe.

*Indian Tribe* means any Indian tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Noncommercial Irrigation of Vegetation* means the supply of water to irrigate lawns, trees, small gardens, and similar vegetation of less than 1 acre.

*Non-Federal Project Sponsor* means a non-Federal project entity or entities meeting the eligibility criteria in § 404.6. A non-Federal project sponsor is also referred to as project sponsor, project sponsors, I, me, my, you, or your in this part.

*Program* means the Reclamation Rural Water Supply Program that is described in § 404.3.

*Reclamation* means the Bureau of Reclamation, U.S. Department of the Interior.

*Reclamation States* means the states and areas referred to in 43 U.S.C. 391, as amended.

*Regional or Watershed Perspective* means an approach to rural water supply planning directed at meeting the needs of geographically dispersed localities across a region or a watershed that will take advantage of economies of scale and foster opportunities for partnerships. This approach also takes into account the interconnectedness of water and land resources, encourages the active participation of all interested groups, and uses the full spectrum of technical disciplines in activities and decision-making.

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*Rural Water Supply Project*, or project, means:

(a) A project that is designed to serve a community or groups of communities, each of which has a current population of not more than 50,000 inhabitants, which may include Indian tribes and tribal organizations, dispersed home sites, or rural areas with domestic, municipal, and industrial water, including incidental noncommercial livestock watering and noncommercial irrigation of vegetation.

(b) A rural water supply project may include the following, or any combination of the following:

(1) The construction or installation of new rural water supply infrastructure and facilities;

(2) The improvement or upgrade of existing rural water supply infrastructure and facilities;

(3) The extension of existing rural water supply infrastructure and facilities to reach an increased service area; and

(4) The inter-connection of existing rural water supply infrastructure and facilities currently serving individual communities, dispersed homesites, rural areas, or tribes.

*Secretary* means the Secretary of the Interior, acting through the Commissioner of the Bureau of Reclamation.

*Tribal Organization* means:

(a) The recognized governing body of an Indian tribe; and

(b) Any legally established organization of Indians that is controlled, sanctioned, or chartered by the governing body, or democratically elected by the adult members of the Indian community to be served by the organization.

#### **§ 404.3 What is the Reclamation Rural Water Supply Program?**

This program addresses domestic, municipal, and industrial water supply needs in rural areas of the Reclamation States. Reclamation's experience, technical expertise, and financial resources assist rural communities to identify their water supply problems and needs, and evaluate options for addressing those needs. Using a regional or watershed perspective, Reclamation assists in planning projects that maximize regional and national benefits.

Through this program, Reclamation works in cooperation with non-Federal project sponsors in Reclamation States on a cost-share basis to:

(a) Investigate and identify opportunities to ensure safe and adequate rural water supplies for domestic, municipal, and industrial use

in rural areas and small communities, including Indian tribes;

(b) Plan the design and construction of rural water supply projects through the conduct of appraisal investigations and feasibility studies; and

(c) Oversee, as appropriate, the construction of rural water supply projects that the Secretary recommends to Congress, which are subsequently authorized and funded for construction by Congress.

#### **§ 404.4 What are the goals of the program?**

The goals of the program are to:

(a) Assess and address urgent and compelling rural water supply needs that are not currently met by other programs;

(b) Promote and apply a regional or watershed perspective to water resources management in planning rural water supply projects;

(c) Develop solutions to address rural water supply needs that are cost-effective, and that generate national net economic benefits as required under the "Economic Principles and Guidelines for Water and Related Land Resources" (Principles and Guidelines). The Principles and Guidelines, published in 1983 by the Water Resources Council pursuant to the Water Resources Planning Act of 1965 (Pub. L. 89-80) as amended, is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. The Principles and Guidelines are intended to ensure proper and consistent planning by Federal agencies in the formulation and evaluation of water and related land resources implementation studies. To enforce any edition other than that specified in this section, the material must be available to the public and approved by the Director of the Federal Register. All approved material is available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030 or go to [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html). Also, a copy of this publication may be obtained and inspected at: Bureau of Reclamation, Denver Federal Center, Building 67, Denver, CO 80225, Policy and Program Services, 303-445-2906 where copies are on file, or at the following website: [http://intra.gp.usbr.gov/resource\\_services/planning\\_process/principles\\_guidelines.pdf](http://intra.gp.usbr.gov/resource_services/planning_process/principles_guidelines.pdf).

(d) Encourage partnerships among rural communities, Indian tribes or

tribal organizations, states or political subdivisions of a state, water districts and associations, and other eligible entities, to address rural water supply issues; and

(e) Complement other existing programs and authorities that address rural water supply issues, and encourage collaboration between programs where appropriate.

#### **§ 404.5 Who is responsible for implementing this rule?**

Authority to implement and make determinations under this rule has been delegated from the Secretary to the Commissioner. The Commissioner is authorized to implement this program and may re-delegate that authority as needed. Questions regarding the program should be directed to your local Reclamation office.

#### **§ 404.6 Who is eligible to participate in the program?**

Those eligible to participate in the program include:

(a) A state or political subdivision of a state, including a department, agency, municipality, county, or other regional or local authority;

(b) An Indian tribe or tribal organization; or

(c) An entity created under state law that has water management or water delivery authority, including for example, an irrigation or water district, canal company, water users association, rural water association or district, a joint powers authority, or other qualifying entity; and

(d) Any combination of the entities listed above, which collectively are referred to as the non-Federal project sponsor, as defined in § 404.2.

#### **§ 404.7 What types of projects are eligible for consideration under the program?**

To be eligible for consideration under the program, a rural water supply project must:

(a) Meet the definition of a rural water supply project in § 404.2; and

(b) Be located in a Reclamation State, as defined in § 404.2.

#### **§ 404.8 Are there any exceptions that would allow a community with greater than 50,000 inhabitants to be part of an eligible rural water supply project?**

Yes. A town or community with a population in excess of 50,000 inhabitants may participate in or be served by an eligible rural water supply project under this program if Reclamation determines that the town or community is a critical partner whose involvement substantially contributes to the financial viability of the proposed project. Such a community could be

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expected to bear a greater proportionate share of the planning, design, and construction costs than other project sponsors, consistent with their capability to pay and the benefits they derive from the project.

**§ 404.9 What types of infrastructure and facilities may be included in an eligible rural water supply project?**

A rural water supply project may include, but is not limited to, the following types of infrastructure and facilities:

- (a) Pumps, pipes, wells, surface water intakes and other diversion, transmission, or distribution systems;
- (b) Storage tanks and small impoundments;
- (c) Water treatment facilities for potable water supplies, including desalination facilities;
- (d) Buildings necessary to house equipment and serve as a center for operations;
- (e) Power transmission and related facilities required for the rural water supply project;
- (f) Equipment and management tools for water conservation, groundwater recovery, and water reuse and recycling;
- (g) Associated features to mitigate adverse environmental consequences of a project; and
- (h) Appurtenances.

**§ 404.10 Are there certain types of infrastructure and facilities that may not be included in a rural water supply project?**

Yes. A rural water supply project may not include:

- (a) Any infrastructure or facilities that would deliver water for commercial irrigation; and
- (b) The construction of major impoundment structures.

**§ 404.11 What type of assistance is available under the program?**

Under the Reclamation Rural Water Supply Program, you may:

- (a) Request Reclamation to conduct an appraisal investigation or feasibility

study for a rural water supply project for you, with your cooperation;

- (b) Request funding through a grant or cooperative agreement to enable you to conduct an appraisal investigation or feasibility study for a rural water supply project yourself, or through a contractor; or

(c) Request Reclamation to review and approve an appraisal investigation or feasibility study completed without assistance from Reclamation.

**§ 404.12 Can Reclamation provide assistance with the construction of a rural water supply project under this program?**

Reclamation may provide assistance with the construction of a rural water supply project developed under this program if Congress specifically authorizes the project and appropriates funds for construction.

**§ 404.13 What criteria will Reclamation use to prioritize requests for assistance under the program?**

All requests for assistance that meet the eligibility requirements in §§ 404.6 and 404.7 will be evaluated by applying the following prioritization criteria:

- (a) Whether there is an urgent and compelling need for a rural water supply project that would:

- (1) Address present or future water supply needs; or
- (2) Promote public health and safety by addressing present and preventing future violations of drinking water standards;

(b) The extent to which a rural water supply project promotes and applies a regional or watershed perspective to water resources management as defined in § 404.2;

(c) The financial need of the project sponsors for assistance with the planning, design, and construction of a rural water supply project, as demonstrated by readily available local and regional economic indicators;

(d) The extent to which Reclamation is uniquely qualified to plan, design, and build the project;

(e) Whether a rural water supply project helps meet applicable requirements established by law;

(f) The extent to which a rural water supply project serves Indian tribes that have nonexistent or inadequate water systems;

(g) The extent to which a rural water supply project is ineligible for comprehensive funding (sufficient to fully fund planning and construction of the entire project) through other assistance programs;

(h) The extent to which a rural water supply project is identified as a priority by state, tribal or local governments;

(i) Whether a rural water supply project incorporates an innovative approach that effectively addresses water supply problems and needs, either by applying new technology or by employing a creative administrative or cooperative solution; and

(j) Other criteria that Reclamation deems appropriate.

**§ 404.14 How will Reclamation provide notice of opportunities for assistance under the program?**

Notice of opportunities for assistance to conduct an appraisal investigation or a feasibility study under § 404.11(a) or (b) will be posted as a program announcement on the required government-wide Web site for announcement of Federal assistance opportunities. Opportunities for assistance will also be advertised locally by Reclamation regional and area offices. You are encouraged to contact your local Reclamation office to find out about upcoming program announcements and to discuss your interest in the program.

**§ 404.15 How can I request assistance under the program?**

This table summarizes the requirements for requesting assistance under the program. The requirements are described in more detail in the sections that follow.

Type of assistance requested	How to request assistance
1. Request Reclamation to conduct an appraisal investigation .....	Submit a statement of interest as described in § 404.16. Reclamation will then advise you whether you are eligible to submit a full proposal.
2. Request funding to conduct an appraisal investigation yourself or through a contractor.	Submit a statement of interest as described in § 404.16. Reclamation will then advise you whether you are eligible to submit a full proposal.
3. Request Reclamation to conduct a feasibility study .....	Submit a full proposal as described in § 404.20.
4. Request funding to conduct a feasibility study yourself or through a contractor.	Submit a full proposal as described in § 404.20.
5. Request Reclamation to review and approve an appraisal investigation or a feasibility study completed without Reclamation assistance.	Submit the investigation or study and a cover letter to your local Reclamation office, as described in § 404.25.



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**§ 404.16 What information must I include in my statement of interest?**

A statement of interest is a preliminary scope of work that must include sufficient information to address all of the eligibility criteria described in §§ 404.6 and 404.7 and the prioritization criteria in § 404.13, as well as any information required by the program announcement. In general, this may include, but is not limited to:

(a) Name, organization, and contact information, including the identification of any partners that may be involved in the appraisal investigation;

(b) Location map and description of the areas to be served by the proposed rural water supply project, including:

- (1) Geographical scope;
- (2) Demographics; and
- (3) Existing rural water supply infrastructure, if any;

(c) Type of assistance being requested through this program as described in § 404.11;

(d) A general description of the problems, needs, and opportunities that the appraisal investigation is being formulated to address, supported by data or documentation where appropriate. The information provided must also address each of the prioritization criteria in § 404.13;

(e) A general description of project alternatives that may be considered in the investigation, including:

- (1) Water supply management alternatives (e.g., types of infrastructure or facilities to deliver new water supplies), if known;
- (2) Water demand management alternatives (e.g., water conservation and other approaches to reduce water consumption), if known; and
- (3) Potential sources of water supply.

(f) A general description of any prior studies on the problems, needs, and water management alternatives at issue; and,

(g) A general description of existing sources of water supply.

**§ 404.17 How will Reclamation evaluate my statement of interest?**

(a) Reclamation will apply the eligibility requirements in §§ 404.6 and 404.7 and the prioritization criteria in § 404.13, to determine whether the proposed rural water supply project is eligible for further consideration through a full proposal;

(b) If the proposed project is not eligible for further consideration, Reclamation will notify you in writing of that outcome; and,

(c) If the proposed project is eligible for further consideration, Reclamation will notify you in writing that you are eligible to develop a full proposal to

conduct an appraisal investigation, as described in § 404.20.

**§ 404.18 How can I request assistance to conduct a feasibility study?**

To request assistance to conduct a feasibility study under § 404.11(a) or (b), consistent with Reclamation's recommendation in an appraisal report, you must submit a full proposal to conduct a feasibility study in response to the program announcement, pursuant to § 404.20. You are not required to submit a statement of interest.

**§ 404.19 What requirements must be met before I can request assistance to conduct a feasibility study?**

All of the following requirements must be met before you can request assistance to conduct a feasibility study:

(a) An appraisal investigation must be completed, with or without assistance from Reclamation;

(b) Reclamation must have reviewed any appraisal investigation prepared without its assistance;

(c) Reclamation must have prepared an appraisal report evaluating the appraisal investigation; and,

(d) The appraisal report must include a recommendation by Reclamation, if appropriate, that a feasibility study should be conducted, as described in § 404.45.

**§ 404.20 What information must I include in my full proposal to conduct an appraisal or a feasibility study?**

A full proposal to conduct an appraisal investigation or a feasibility study is a detailed scope of work that must include sufficient information to address the eligibility criteria described in §§ 404.6 and 404.7, and the prioritization criteria in § 404.13. In general this may include, but is not limited to:

(a) The issues to be addressed in the appraisal investigation or feasibility study and a plan for addressing those issues. The information provided must also address each of the prioritization criteria in § 404.13;

(b) A description of who will conduct the appraisal investigation or feasibility study, which could include you, your contractor, or Reclamation;

(c) If you propose that either you or your contractor will conduct the appraisal investigation or feasibility study, you must include the information necessary for Reclamation to determine whether you or your contractor are qualified to conduct the investigation or study, and whether having you or your contractor conduct it is a cost-effective alternative, in accordance with the criteria in §§ 404.23 and 404.24;

(d) A schedule for conducting the work, identifying specific tasks and the duration of each task, and major milestones with dates for each milestone;

(e) A complete budget for conducting the appraisal investigation or feasibility study, including an itemized tabular summary of known or expected costs and a narrative description of those costs;

(f) A funding plan that details how the appraisal investigation or feasibility study will be paid for, taking into consideration applicable assistance and non-Federal cost-share requirements; and

(g) Any other information requested by Reclamation in the program announcement.

**§ 404.21 What is Reclamation's role in preparing the full proposal?**

(a) If you are requesting Reclamation to prepare an appraisal investigation or feasibility study on your behalf under § 404.11(a), Reclamation will work with you on a collaborative basis to provide the information requested in § 404.20(a), (b), (d), (e) and (f).

(b) If you are requesting funding through a grant or cooperative agreement under § 404.11(b), Reclamation will be available to provide you with guidance and assistance in preparing your full proposal, upon request.

**§ 404.22 How will Reclamation evaluate my full proposal?**

(a) Reclamation will evaluate the full proposal to conduct an appraisal or a feasibility study in order to ensure that it meets the requirements in § 404.20 and is, therefore, complete. Reclamation will notify you in writing of the outcome of this determination.

(b) If it is complete, Reclamation will evaluate your proposal against all other proposals received, using a competitive review process based on an application of the prioritization criteria in § 404.13.

(c) Full proposals will be selected for award of assistance based on:

(1) The evaluation process, as described in § 404.22(b); and

(2) The availability of appropriations; and

(3) Other criteria that Reclamation deems appropriate.

(d) Once the proposal evaluation and selection process is complete, you will be notified in writing of the outcome of your request for assistance.

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**§ 404.23 How will Reclamation determine whether you or your contractor is qualified to conduct an appraisal investigation or a feasibility study?**

If you are requesting funding under § 404.11(b) to conduct an appraisal investigation or a feasibility study yourself or through a contractor, Reclamation will evaluate whether you, your technical staff, or contractor are qualified to perform the appraisal investigation or feasibility study based on their demonstrated qualifications and experience in performing or managing similar activities. Areas of expertise needed may include, but are not limited to, water management planning, engineering, hydrology, biology, demography, finance, and economics.

**§ 404.24 How will Reclamation determine whether it is cost-effective for me or my contractor to conduct the appraisal investigation or feasibility study?**

Reclamation will take the following steps to determine whether it is cost-effective for you or your contractor to conduct the appraisal investigation or feasibility study:

- (a) Reclamation will review and evaluate the reasonableness of your full proposal, including the scope of work, the estimated costs, anticipated work schedule, and products to be delivered;
- (b) At its discretion, Reclamation may also choose to prepare an independent government cost estimate to analyze whether it would be more cost-effective for Reclamation to complete the appraisal investigation or feasibility study;
- (c) Reclamation will notify you in writing of its determination regarding the cost-effectiveness of your proposal and the basis for its decision.

**§ 404.25 How can I request Reclamation to review an appraisal investigation or feasibility study that was not completed under this program?**

- (a) To request Reclamation to review an appraisal investigation or feasibility study that was not completed under this program as provided under § 404.11(c), you must submit the appraisal investigation or feasibility study to your local Reclamation office with a cover letter requesting Reclamation to review it.
- (b) Your cover letter must address the eligibility criteria set forth in §§ 404.6 and 404.7 and the prioritization criteria in § 404.13.
- (c) You may make your submittal at any time and are not required to submit a statement of interest in response to the program announcement, as required for requests to conduct an appraisal

investigation or feasibility study under § 404.11(a) or (b).

**§ 404.26 Must an appraisal investigation be completed before I can request Reclamation to review a feasibility study that was not completed under this program?**

In general, Reclamation must review an appraisal investigation and prepare an appraisal report recommending that a feasibility study be conducted before Reclamation can review a feasibility study completed without Reclamation assistance under § 404.11(c). However, Reclamation may review a feasibility study without first reviewing and approving an appraisal investigation, if Reclamation determines that:

- (a) No appraisal investigation was prepared for the project;
- (b) The feasibility study satisfies the appraisal criteria set forth in § 404.44; and
- (c) Reclamation documents these findings in the feasibility report.

**§ 404.27 How will Reclamation evaluate my request to review an appraisal investigation or feasibility study completed without the support of Reclamation?**

- (a) Upon receipt of your submittal, Reclamation will apply the eligibility criteria in §§ 404.6 and 404.7 and the prioritization criteria in § 404.13, to determine whether the appraisal investigation or feasibility study is eligible to be reviewed under the program. Reclamation will notify you in writing of the outcome of this determination.
- (b) If the proposed appraisal investigation or feasibility study is eligible for review, Reclamation will evaluate the investigation or study in accordance with the process set forth in § 404.43, for an appraisal investigation, or § 404.48, for a feasibility study.

**§ 404.28 Is it possible to expedite the completion of an appraisal investigation or feasibility study?**

Yes. If Reclamation determines that a community or groups of communities to be served by a proposed rural water supply project has urgent and compelling water needs, Reclamation will, to the maximum extent practicable, expedite appraisal investigations and reports and feasibility studies and reports conducted under this program.

**§ 404.29 Can the level of effort needed to complete an appraisal investigation or feasibility study be scaled to be proportional to the size and cost of the proposed project?**

Yes. In general, the level of effort for an appraisal investigation or feasibility study should be scaled to take into consideration the total size, cost, and

complexity of the proposed rural water supply project in order to reduce the total cost of the investigation or study. However, the effort to scale the appraisal investigation or feasibility study must not diminish the quality of the data, the analysis, or the overall completeness of the investigation or study.

### Subpart B—Cost-Sharing

**§ 404.30 How much Federal funding can Reclamation provide for the completion of an appraisal investigation?**

In general, Reclamation will be responsible for 100 percent of the cost of an appraisal investigation conducted under § 404.11(a) or (b), up to \$200,000. If the cost of the appraisal investigation exceeds \$200,000, your cost-share will be 50 percent of the amount exceeding \$200,000.

**§ 404.31 What forms of non-Federal cost-share payment are acceptable?**

The non-Federal cost-share for an appraisal investigation or a feasibility study may be provided in the form of money or in-kind services that Reclamation determines are necessary and reasonable for the conduct and completion of the investigation or study. The determination of allowability, allocability, and reasonableness is governed by the Cost Principles of the Office of Management and Budget, codified at 2 CFR 220, 225, and 230, and in the Federal Acquisitions Regulations, Part 312.

**§ 404.32 Can Reclamation reduce the non-Federal cost-share required for an appraisal investigation?**

Yes. Reclamation may reduce the non-Federal cost-share for appraisal investigations below 50 percent of the costs exceeding \$200,000, if:

- (a) Reclamation determines that there is an overwhelming Federal interest in conducting the appraisal investigation, and you demonstrate financial hardship. Financial hardship will be determined in accordance with Reclamation's official policies, guidance and standards, which are available at your local Reclamation office; and
- (b) Reclamation consults with other Federal agencies that are partners in the project and determines that a reduction in the non-Federal cost-share is appropriate.

**§ 404.33 How much Federal funding can Reclamation provide for the completion of a feasibility study?**

In general, Reclamation will be responsible for 50 percent of the cost of a feasibility study conducted under § 404.11(a) or (b). You will be

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responsible to pay for the remaining 50 percent of the cost of the study using non-Federal funding.

**§ 404.34 Can Reclamation reduce the amount of non-Federal cost-share required for a feasibility study?**

Yes. Reclamation may reduce the non-Federal cost-share required for a feasibility study to an amount less than 50 percent of the study costs if:

(a) Reclamation determines that there is an overwhelming Federal interest in conducting the feasibility study, and you demonstrate financial hardship. Financial hardship will be determined in accordance with Reclamation's standards, which are available at your local Reclamation office; and

(b) Reclamation consults with other Federal agencies that are partners in the project and determines that a reduction in the non-Federal cost-share is appropriate.

**§ 404.35 Is there a different non-Federal cost-share requirement for feasibility studies that involve a community greater than 50,000 inhabitants?**

Yes. If the feasibility study involves a rural water supply system that will serve a community with a population in excess of 50,000 inhabitants, pursuant to the exception provided in § 404.8, you may be required to pay more than 50 percent of the costs of the study. Determination of the appropriate amount of the non-Federal cost-share will be based on the same criteria used to evaluate your capability to pay the non-Federal share of construction costs, set forth in § 404.39.

**§ 404.36 Will Reclamation reimburse me for the cost of an appraisal investigation or a feasibility study that was not completed under § 404.11(a) or (b)?**

No. The cost-share provisions described in this rule only apply to appraisal investigations and feasibility studies that are completed under the program pursuant to § 404.11(a) or (b). Reclamation will not reimburse you or provide program funding for any expenses related to an appraisal investigation or a feasibility study that is completed without assistance from Reclamation.

**§ 404.37 How will Reclamation determine the appropriate non-Federal share of construction costs?**

Reclamation will determine the appropriate non-Federal share of construction costs in the process of developing the feasibility report. The non-Federal cost-share will be:

- (a) At least 25 percent of the total construction costs; and
- (b) An additional amount based on your capability to pay, as appropriate, to

be determined by Reclamation based on the factors in § 404.39.

**§ 404.38 Are there different requirements for determining the appropriate non-Federal share of construction costs to be paid by Indian tribes?**

Yes. The appropriate non-Federal share of construction costs to be paid by Indian tribes will be based on:

(a) Consideration of an Indian tribe's capability to pay at least 25 percent of the construction costs, to be determined in accordance with the factors in § 404.39; and

(b) If Reclamation determines, based on the analysis in § 404.38(a), that an Indian tribe is not capable of paying at least 25 percent of the construction costs, Reclamation may recommend in its feasibility report that the collection of all or part of the non-Federal construction costs apportioned to an Indian tribe be deferred, unless or until Reclamation determines that the Indian tribe should pay all or a portion of those costs.

**§ 404.39 What factors will Reclamation consider in evaluating my capability to pay 25 percent or more of the construction costs?**

Reclamation will consider the following factors:

(a) Economic factors for the project area, relative to the state average, including:

- (1) Per capita income;
- (2) Median household income; and
- (3) The poverty rate;

(b) The ability of the project sponsor to raise tax revenues or assess fees such as user fees and ad valorem taxes or issue bonds;

(c) The strength of the project sponsor financial statements in comparison to other similar entities over the previous 4 years, including a review of:

- (1) Current (includes cash and inventory) and non-current assets (property, plants etc.);
- (2) Net Assets (total assets minus total liabilities);
- (3) Changes to net assets;
- (4) Operating revenues (water and power sales);
- (5) Operating expenses (variable costs and depreciation, maintenance and repair);
- (6) Cash flow from operating activities (positive value from water sales minus payments to supplies and employees);
- (7) Current (current bonds payable and accounts payable) and non-current liabilities (long term debt payable);
- (8) Outstanding debts and all other financial obligations;
- (9) Collateral/equity as appropriate;
- (10) Cash flows from capital and related financing activities (negative

value from principle paid on bonds and interest payments);

- (11) Net cash flow; and
- (12) Any non-operating revenues and expenses;

(d) Funding commitments from non-Federal sources, other than the non-Federal project sponsor, including resources committed by state, county, or local governments;

(e) The existing cost of water and the cost to develop new water supplies in the region; and

(f) The impact of the proposed project on water rates;

(g) The projected impact of the proposed project on the non-Federal project sponsor's ability to raise or generate revenues;

(h) The non-Federal project sponsor's financial history including their past performance on repaying loans and other debts; and

(i) Any other financial means of the non-Federal project sponsor that is not captured in this subsection.

**§ 404.40 What is the non-Federal share of operation, maintenance, and replacement costs?**

You are required to pay 100 percent of the operation, maintenance, and replacement costs of any rural water supply project planned under this program.

### Subpart C—Appraisal Investigations

**§ 404.41 How will an appraisal investigation be conducted under this program?**

Appraisal investigations will be conducted in accordance with Reclamation-approved standards governing the approach, process and content of the appraisal investigation. You can obtain information about Reclamation's standards and requirements for conducting an appraisal investigation by contacting your local Reclamation office.

**§ 404.42 How much time is provided to complete an appraisal investigation?**

An appraisal investigation must be scheduled for completion not later than 2 years after the date on which the appraisal investigation is initiated, unless otherwise agreed to in writing by Reclamation.

**§ 404.43 What process will Reclamation follow to determine if an appraisal investigation is ready for review?**

(a) Reclamation will evaluate whether the appraisal investigation adequately addresses all of the items required in Reclamation's standards for conducting appraisal investigations, and is, therefore ready for review. Reclamation

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standards and requirements for the content of an appraisal investigation are available at your local Reclamation office. Reclamation will notify you in writing of the outcome of this determination within 90 business days from the date of Reclamation's receipt of the appraisal investigation;

(b) If the appraisal investigation does not include the required information, you will be notified in writing of the reasons why, and you will have an opportunity to make changes and re-submit the corrected appraisal investigation to Reclamation for additional review. As appropriate, Reclamation will work with you to suggest approaches to correct the appraisal investigation;

(c) Once Reclamation determines that the appraisal investigation includes all of the required information, Reclamation will review the investigation to determine, based on an application of the criteria set forth in § 404.44, whether or not it is appropriate to proceed to a feasibility study. Reclamation will document its findings in an appraisal report, as described in § 404.45;

(d) Reclamation's review of an appraisal investigation will take no longer than 180 business days from its receipt of the appraisal investigation to its completion of the appraisal report, excluding time when Reclamation is waiting for additional information from the project sponsor.

**§ 404.44 What criteria will Reclamation apply to determine whether it is appropriate to recommend that a feasibility study be conducted?**

In reviewing an appraisal investigation, Reclamation will apply the following criteria to determine whether at least one of the alternatives identified is appropriate for further analysis through a feasibility study, or whether the investigation should be terminated without conducting a feasibility study, including:

(a) Whether a reasonable range of alternatives (structural or non-structural) have been formulated and evaluated;

(b) Whether the recommendation for further study of one or more alternatives is clearly supported by the analysis in the appraisal investigation; and

(c) For each alternative considered in the investigation, whether the alternative:

(1) Identifies viable water supplies and water rights sufficient to supply the proposed service area, including all practicable water sources such as lower quality waters, non-potable waters, and water-reuse-based water supplies;

(2) Has a positive effect on public and health and safety;

(3) Will meet water demand, including projected future needs;

(4) Provides environmental benefits, including source water protection;

(5) Applies a regional or watershed perspective and promotes benefits in the region in which the project is carried out;

(6) Implements an integrated water resources management approach;

(7) Enhances water management flexibility, including providing for local control of water supplies and, where applicable, encouraging participation in water banking and markets;

(8) Promotes long-term protection of water supplies;

(9) Includes preliminary cost estimates that are reasonable and supported;

(10) Is cost-effective and generates national net economic benefits as required under the Principles and Guidelines (incorporated by reference at § 404.4);

(11) For each alternative proposed for further evaluation in a feasibility study, whether the project sponsor has the capability to pay 100 percent of the costs associated with the operation, maintenance, and replacement of the facilities constructed or developed; and

(12) Other factors that Reclamation deems appropriate.

**§ 404.45 What will be included in the appraisal report prepared by Reclamation?**

The appraisal report prepared by Reclamation will include Reclamation's finding as to whether or not it is appropriate to proceed to a feasibility study, based on Reclamation's review of the appraisal investigation and application of the criteria set forth in § 404.44, and the reasons supporting that finding.

**§ 404.46 Who will the appraisal report be provided to?**

A copy of the appraisal report will be provided to you. Reclamation will also publish a notice of availability of the appraisal report in the **Federal Register** and will make a copy of the report available to the public upon request.

### Subpart D—Feasibility Studies

**§ 404.47 How will a feasibility study be conducted under this program?**

Feasibility studies will be conducted in accordance with Reclamation's standards governing the approach, process and content of the feasibility study, including the Principles and Guidelines (incorporated by reference at § 404.4). You can obtain information about Reclamation's standards and

requirements for conducting feasibility studies by contacting your local Reclamation office.

**§ 404.48 What process will Reclamation follow to determine if a feasibility study is ready for review?**

(a) Reclamation will evaluate whether the feasibility study adequately addresses all of the items required in Reclamation's standards for conducting a feasibility study, and is, therefore, ready for review. Reclamation standards and requirements for the content of a feasibility study are available at your local Reclamation office. Reclamation will notify you in writing of the outcome of this determination within 90 business days from the date of Reclamation's receipt of the feasibility study;

(b) If the feasibility study does not include the required information, you will be notified in writing of the reasons why, and you will have an opportunity to make changes and re-submit the corrected feasibility study to Reclamation for additional review. Where appropriate, Reclamation will work with you to suggest approaches to correct the feasibility study;

(c) Once Reclamation determines that the feasibility study includes all of the required information, Reclamation will review the study to determine, based on application of the criteria set forth in § 404.49, whether or not it is appropriate to recommend to Congress that it authorize construction of the project;

(d) Reclamation's review of the feasibility study will take no longer than 180 business days from the date that Reclamation determines that the study includes all of the required information and is ready for review; and

(e) Reclamation will document its findings in a feasibility report, as more fully described in section § 404.50.

**§ 404.49 What criteria will Reclamation use to recommend that a proposed rural water supply project be authorized for construction?**

In reviewing a feasibility study, Reclamation will assure that the proposed project is consistent with the policies and programs of the President and will apply the following criteria to evaluate and determine whether it is appropriate to recommend authorization for construction:

(a) The degree to which the project meets the prioritization criteria in § 404.13;

(b) The outcome of the environmental analysis;

(c) Whether there is a Federal interest in the project, including:

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(1) A clearly defined Federal nexus to a proposed project;  
(2) The Federal cost of the project in relation to the amount of Federal resources likely to be available; and  
(d) Whether the recommended project alternative is clearly supported by the feasibility study, based on application of the following factors, including the extent to which the alternative:

(1) Addresses near and long-term water demand;  
(2) Advances public health and safety and consideration of other benefits of the proposed rural water supply project;  
(3) Addresses environmental quality and source water protection issues;  
(4) Addresses opportunities to treat and use low-quality or non-potable water, water-reuse based supplies, and brackish and saline waters, through innovative and economically viable treatment technologies;  
(5) Addresses opportunities for water conservation through structural or non-structural approaches and demonstration technologies to reduce water use and water system costs;  
(6) Addresses opportunities to take advantage of economic incentives and the use of market-based mechanisms;  
(7) Includes a reasonable and supported estimate of construction costs and operation, maintenance, and replacement costs;  
(8) Is consistent with the Principles and Guidelines (incorporated by reference at § 404.4).

(9) Includes a reasonable and supported operation, maintenance, and replacement plan to assist the project sponsor in establishing rates and fees and a schedule identifying how those costs should be allocated to each non-Federal project sponsor;  
(10) Demonstrates your financial capability to pay at least 25 percent of the design and construction costs and 100 percent of the operation, maintenance, and replacement costs;  
(11) Is eligible for guaranteed loans;  
(12) Includes adequate administrative and financial controls to manage construction and operation, maintenance, and replacement of the project;

(13) Is eligible for assistance under other Federal authorities to pay for discrete features or portions of the project;  
(14) Is technically feasible and can be constructed within industry standards;  
(15) Involves partnerships with other state, local, or tribal governments or Federal entities; and  
(16) In the case of Indian tribes and tribal organizations, the extent to which the alternative addresses the goal of economic self-sufficiency;

(17) The degree to which the proposed project demonstrates that it has clear deliverables, will be accomplished within a reasonable schedule, within budget, and is well managed; and  
(18) Other factors and criteria that Reclamation deems appropriate.

**§ 404.50 What information will be included in the feasibility report prepared by Reclamation.**

The feasibility report prepared by Reclamation will include:

(a) Reclamation's finding as to whether the proposed rural water supply project is feasible and the reasons supporting that determination;

(b) A recommendation to Congress regarding whether or not the proposed rural water supply project should be authorized for construction, and the reasons supporting the recommendation. This recommendation will be based on Reclamation's review of the feasibility study and its application of the criteria set forth in § 404.49; and  
(c) If the rural water supply project is recommended for construction, the feasibility report will also include:

(1) The appropriate Federal and non-Federal share of the capital construction costs for the project and for projects involving multiple project sponsors, the portion of those costs allocated to each project sponsor;

(2) What amount of grants, loan guarantees, or combination of grants and loan guarantees should constitute the Federal share of the project;  
(3) The annual operation, maintenance, and replacement costs, and the portion of those costs allocated to each project sponsor participating in the rural water supply project; and  
(4) An assessment of the financial capability of each project sponsor participating in the rural water supply project to pay the portion of the construction and operation, maintenance, and replacement costs allocated to it.

**§ 404.51 Are proposed projects under the Rural Water Supply program reviewed by the Administration?**

Yes. The Administration will review all projects proposed for funding under the Reclamation's Rural Water Supply program. This includes review under Executive Order 12322 to determine whether the project is consistent with the policies and programs of the President. This review will occur before the feasibility report is finalized.

**§ 404.52 Who will the feasibility report be provided to?**

Upon its completion, Reclamation will:  
(a) Provide the feasibility report to you;  
(b) Submit the feasibility report to the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives;  
(c) Make the report publicly available, along with associated study documents; and  
(d) Publish in the *Federal Register* a notice of the availability of the results.

**Subpart E—Miscellaneous**

**§ 404.53 Does this rule provide authority for the transfer of pre-existing facilities from Federal to private ownership, or from private to Federal ownership?**

No. This rule does not authorize the transfer of pre-existing facilities or pre-existing components of any water system from Federal to private ownership, or from private to Federal ownership.

**§ 404.54 Who will hold title to a rural water project that is constructed following the completion of an appraisal investigation or feasibility study under this program?**

Title to any rural water project planned, designed and recommended for construction under this program will be held by the non-Federal project sponsor.

**§ 404.55 Who is responsible for the operation, maintenance, and replacement costs?**

You will be responsible for 100 percent of the operation, maintenance, and replacement costs for any rural water facility that is planned, designed, and recommended for construction under this program.

**§ 404.56 If a financial assistance agreement is entered into for a rural water supply project that benefits more than one Indian tribe, is the approval of each Indian tribe required?**

Yes. When a financial assistance agreement is entered into with an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe is a prerequisite to entering into the financial assistance agreement.

**§ 404.57 Does this rule have any effect on state water law?**

No. Neither the Act nor this rule preempts or affects state water law or any interstate compact governing water. Reclamation will comply with state water laws in carrying out this rule.



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**§ 404.58 Do rural water projects authorized before the enactment of the Rural Water Supply Act of 2006 have to comply with the requirements in this rule?**

No. Neither the Act nor this rule imposes any additional requirements on rural water supply projects that were authorized for construction before the date of enactment of the Act.

**§ 404.59 If the Secretary recommends a project for construction, is that a promise of Federal funding?**

No. Congress must first authorize the project for construction and Federal funding is subject to the availability of appropriations.

**§ 404.60 Does this rule contain an information collection that requires approval by OMB?**

Yes. This rule does contain an information collection that is approved by OMB, under Control Number 1006-0029. The Paperwork Reduction Act provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

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#### LEGAL SERVICES CORPORATION

##### 45 CFR Part 1602

##### Procedures for Disclosure of Information Under the Freedom of Information Act

**AGENCY:** Legal Services Corporation.  
**ACTION:** Final rule.

**SUMMARY:** LSC is revising its regulation on procedures for disclosure of information under the Freedom of Information Act to implement changes in that law made by the OPEN Government Act of 2007. LSC is also designating the Office of Inspector General as a separate component for receiving requests for its records and making two technical amendments.

**DATES:** This Final Rule is effective as of December 31, 2008.

**FOR FURTHER INFORMATION CONTACT:** Mattie Cohan, Senior Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, 3333 K St., NW., Washington, DC 20007; 202-295-1624 (phone); 202-337-6519 (fax); [mcohan@lsc.gov](mailto:mcohan@lsc.gov) (e-mail).

**SUPPLEMENTARY INFORMATION:** LSC is subject to the Freedom of Information Act (FOIA) by the terms of the Legal Services Corporation Act. 42 U.S.C.

2996d(g).<sup>1</sup> LSC has implemented FOIA procedures through the adoption of regulations found at 45 CFR Part 1602.

On December 31, 2007, President Bush signed the Openness Promotes Effectiveness in our National Government Act of 2007 ("OPEN Government Act" or "Act") into law. The OPEN Government Act amends FOIA in an effort to improve media and public access to government records. In order to bring LSC's FOIA regulations into conformance with the changes to FOIA made by the OPEN Government Act provisions, the LSC Board of Directors initiated a rulemaking on August 2, 2008 and LSC issued a Notice of Proposed Rulemaking (NPRM) on August 14, 2008 (73 Fed. Reg. 45764) proposing revisions to the regulation and seeking public comment. LSC received no comments on the NPRM and LSC adopts the revisions to the regulation as proposed. The changes to Part 1602 are discussed in greater detail below.

##### Section-by-Section Analysis

###### Definitions—45 CFR 1602.2

###### Section 1602.2(g)—Records

Under LSC's regulations, "records" are various materials "made or received by the Corporation in connection with the transaction of the Corporation's business and preserved by the Corporation." 45 CFR 1602.2(g). Section 9 of the OPEN Government Act expands the statutory definition of "record" to include any information that is maintained for an agency by an entity under Government contract, for the purposes of records management. LSC proposed to amend § 1602.2(g) to conform the regulation with the expanded statutory definition by specifically referencing information maintained by LSC under contract for the purposes of records management. LSC adopts the revisions as proposed.<sup>2</sup>

###### Section 1602.2(h)—Representatives of News Media

FOIA provides that "representatives of the news media" may not be charged fees for search and review time associated with responding to their FOIA requests. 5 U.S.C. 552(a)(4)(A)(ii)(II). The term "representative of the news media" is not defined in FOIA, but LSC's FOIA

<sup>1</sup> Absent this authority, LSC would not otherwise be subject to FOIA since LSC is not an agency, department or instrumentality of the Federal government. 42 U.S.C. 2996d(e)(1).

<sup>2</sup> In accordance with Federal Register requirements, LSC is not including any specific regulatory text language in this preamble. Readers are referred to the regulatory text section *supra*.

regulation at Part 1602 currently contains a definition based on a definition of that term appearing in guidance published by the Office of Management and Budget. See 53 FR 6151 (March 1, 1988); 52 FR 10012 (March 27, 1987).

The OPEN Government Act of 2007 clarifies that "freelance" journalists and "alternative media" news sources (such as online news sources) are "representatives of the news media" for the purposes of the fee structure. Specifically, § 3 of the OPEN Government Act defines "representative of the news media" as "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." That section goes on to provide:

In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

Although LSC's existing definition of "representative of the news media" is not substantively inconsistent with or contrary to the newly clarified definition in the OPEN Government Act, LSC believes that it is prudent to amend its regulatory definition to reflect the revised statutory language. LSC believes that substituting the clarified definition for the existing one will ensure that LSC's regulation reflects the full intent of Congress. Accordingly, LSC proposed to amend § 1602.2(h) to reflect the statutory language. LSC adopts the definition as proposed.

##### Requests for Records—45 CFR 1602.8

Agencies are required to make determinations on whether to comply with FOIA requests within twenty (20) business days of receipt of a request.